24TH FEDERAL LITIGATION COURSE

DISCOVERY - DEPOSITIONS

I. DEPOSITIONS – RULES AND PROCEDURES

A. Depositions Upon Written Questions (Fed. R. Civ. P. 31).

1. "Interrogatories" to non-parties.

2. Subpoena issued under Fed. R. Civ. P. 45 can compel the witness to attend.

3. No more than 10 depositions under this rule and under Rule 30 may be taken by all the plaintiffs, all the defendants, or all the third-party defendants without leave of court. Further, no witness may be deposed more than once.

4. General Procedure.

(a) Party noticing the deposition must serve notice and his questions upon all other parties.

(b) Parties then have 14 days to serve cross-examination questions. Within 7 days of service of cross-examination questions, party noticing deposition may serve re-direct questions. Opponent then has 7 days to serve re-cross.

(c) After all questions have been served and re-served, party noticing the deposition delivers them to the court reporter and issues subpoena for the witness. Court reporter reads the questions to the witness and records the answers.

5. Practical Considerations.

(a) Much cheaper to mail a set of questions to a court reporter than to fly to some distant location to depose the witness in person.

(b) Useful for establishing evidentiary foundations to authenticate documents or to lay foundations for business records, etc.

(c) If the witness knows anything about the "facts" of the case, the deposition upon written questions is a very cumbersome and unreliable way to get that person's testimony.

(d) Will probably become even more underutilized as video-conferencing for depositions becomes cheaper and more accessible.

B. Depositions Upon Oral Examination (Fed. R. Civ. P. 30).

1. General Procedures.

(a) Must give "reasonable notice" in writing to all other parties. Must include time, date, place, and name of witness to be examined, as well as the manner in which the deposition will be recorded.

(b) What is "reasonable" will depend upon the circumstances. Compare Lloyd v. Cessna Aircraft, 430 F. Supp. 25 (E.D. Tenn. 1976) (Two days not reasonable), with FAA v. Landry, 705 F.2d 624 (2d Cir. 1983) (Four days reasonable). But see National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602 (11th Cir. 1984) (Four days not reasonable).

(c) Notice served less than 11 days prior to the deposition is risky. Under Rule 32, if a party "promptly" files a motion for protective order that the deposition be taken at another time or place or not be taken, and the motion is pending when the deposition is taken, the deposition may not be used against the party. Fed. R. Civ. P. 32(a)(3).

(d) Witness attendance may be compelled through the use of a subpoena. Fed. R. Civ. P. 45. Notice is sufficient to compel the attendance of a party. Pinkham v. Paul, 91 F.R.D. 613 (D. Me. 1981).

(e) General rule is that the plaintiff must appear for his deposition in the forum. Martin Engineering Co. v. Vibrators, Inc., 20 Fed. R. Serv. 2d (Callaghan) 486 (E.D. Ark. 1975). But, the place of the deposition is within the sole discretion of the court and it may alter the location as it deems appropriate. Young v. Clearing, 30 Fed. R. Serv. 2d (Callaghan) 789 (E.D. Pa. 1980). Court will consider convenience, expense, etc. Army policy is to make its employees available for deposition at their duty station without subpoena.

(f) Under Fed. R. Civ. P. 30(b)(6), a party may take the deposition of a corporation, association, or governmental agency by noticing the organization and specifying the scope of the matters it wishes to inquire into. The organization must then designate the witness who will testify. Any admissions made by the designated witness are admissible against the organization. Sanders v. Circle K. Corp. 137 F.R.D. 292 (D. Az. 1991); Moore v. Pyrotech Corp., 137 F.R.D. 356 (D. Kan. 1991). See King v. Pratt & Whitney, 161 F.R.D. 475 (S.D. Fla. 1995) for a discussion of the proper procedure and scope of questioning at a deposition noticed pursuant to Rule 30(b)(6).

(g) No more than 10 depositions under this rule and under Rule 31 may be taken by all the plaintiffs, all the defendants, or all the third-party defendants without leave of court. Further, no witness may be deposed more than once.

(h) A deposition "may be recorded by sound, sound-and-visual, or stenographic means" unless the court orders otherwise.

(1) The party taking the deposition must state in the notice the method by which the testimony will be recorded.

(2) With prior notice to the deponent and the other parties, a party may designate and arrange for another method of recording the testimony, at that party's expense.

(3) Any party may arrange for a transcipt to be made from a deposition recorded by other than stenographic means.

(4) If a nonstenographically recorded deposition is used at trial, those portions used must be transcribed. The stated preference for the presentation of deposition evidence is by nonstenographic means. Fed. R. Civ. P. 32(c).

(i) Fed. R. Civ. P. 30(b)(7) provides deposition can be taken by telephone or other remote electronic means (e.g. satellite television) upon stipulation of parties or court order. Cost effective means to secure evidence, but obvious limitations. See Baker v. Institute for Scientific Information, 134 F.R.D. 117 (E.D. Pa. 1991).

(j) If, before to the conclusion of the deposition, the deponent or any party requests to review the deposition before it is filed, the deponent will be given 30 days after the transcript or recording is available to review and correct it. Purpose of review is to correct substantive or transcription errors of the court reporter, not to permit broad amendment of testimony. Greenway v. International Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992) (Sixty-four corrections in 200 page deposition, many of them substantive, not permitted.)

(k) As a general rule, "counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer." Armstrong v. Hussman Corp., 163 F.R.D. 299, 303 (E.D. Mo. 1995).

(l) Depositions are presumptively limited to one day of seven hours. However, the court "must allow additional time . . . if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination." Fed. R. Civ. P. 30(d)(2).

II. TAKING AND DEFENDING ORAL DEPOSITIONS – PRACTICE TIPS

A. Defending Depositions.

1. Witness preparation. Every witness should be prepared before the deposition, but the nature and degree of pre-deposition preparation depends on the type of witness and his prior testimonial experience.

2. Your preparation should be designed to make all witnesses informed about and comfortable with the deposition process and

capable of reciting the relevant information they possess in a fashion most favorable to your position in the litigation. It should include:

(a) A review of the relevant evidence likely to be elicited during questioning. Let the witness tell the story first, then go back over parts and explore extent of witness' knowledge, recollection, etc.

(b) A review of all documents which the witness is likely to see during the deposition.

(1) In some cases there may be documents which exist, but you decide the witness should not review prior to testifying. (e.g. a statement by another witness substantially similar to the deponent when the opposing counsel is likely to raise a claim that they collaborated on their testimony). The witness should be told of the existence of the document and what its general nature is so that he will be confident in declaring that he has not previously seen it when it is shown to him.

(2) Caveat: use of privileged documents to prepare a witness for deposition testimony may result in the waiver of the privilege. Sprock v. Peil, 759 F.2d 312 (3d Cir. 1985); S & A Painting Co. Inc., v. O.W.B. Corp., 103 F.R.D. 407 (W.D. Pa. 1984). See the Note of Advisory Committee on Rules, 1993 Amendment to Rule 26(a)(2)(B) ("[L]itigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions - whether or not ultimately relied upon by the expert - are privileged . . . .")

(3) Ensure that deponent has reviewed all his prior statements before being deposed. See Sims v. Lafayette Parish School Bd., 140 F.R.D. 338 (W.D. La. 1992).

(c) Instruction about the three primary purposes of a deposition:

(1) To fix the witness' testimony so that it may be altered at trial only at the expense of the witness' credibility;

(2) To find out what the witness knows;

(3) To assess how credible the witness' testimony will be at trial.

(d) A reminder that the witness will be testifying under oath and that he is required to tell the truth. If opposing counsel asks what the witness was told in preparation, the one instruction that should always be recited is that he was told to tell the truth.

(e) A warning against volunteering information--Being truthful doesn't require the witness to volunteer information that hasn't been elicited by questioning.

(f) A reminder to listen carefully to questions and to ask for the question to be repeated or for clarification if he doesn't understand the question.

(g) A suggestion that questions which can't be answered with "yes" or "no" even though they are phrased to elicit one of those responses, can and <u>should</u> be qualified with additional information. The opposing counsel is not "entitled to a yes or no answer" to any question.

(h) A reassurance that "I don't know" and "I don't remember" are perfectly acceptable responses if they are truthful. However, the questioner may ask for estimates and "best guesses" and there is no rule against these, so long as the record is clear that the response is an estimate.

(i) A reassurance that the preparation session you are conducting is perfectly appropriate and that it is acceptable to relate any of it that the witness can recall if he is questioned about it. Tell your witness, "If you remember nothing else about this session, please recall that I told you to tell the truth."

(j) A warning that the deposition process and the opposing counsel should be taken very seriously. The questioner is not there to help the witness, nor to do him any favors. Treat opposing counsel with courtesy, but there's no reason to be overly "friendly." Don't joke around. A cute remark may not seem so funny when read in court. Don't converse with anyone, the court reporter, opposing counsel, or other attendees about the subject matter of the litigation or related aspects. There is no such thing as a remark "off the record."

(k) A suggestion that the witness should pause and think before answering. This will give you time to object and the witness time to formulate a coherent response.

(l) An instruction that the witness should ask for a break when he needs one. The deposition is not an endurance contest. Confirm that the deposition will probably take some time and that the witness should not assume that it's nearly over simply because he believes he has told his entire story.

(m) A warning that the witness should not agree to do anything for counsel after the deposition. The witness has no obligation to do additional work or research, to improve his memory, or to fill in forgotten details.

(n) An instruction that, if you object, he should stop talking and listen to the objection. Tell the witness that the objection is made only to preserve it for later, but that frequently, listening to the objection will point out deficiencies in the question that may not otherwise be apparent.

3. Preparing expert witnesses. Preparing an expert witness for his deposition poses special problems.

(a) Don't assume that the expert knows or recalls all of the "general witness" instructions. It's the witnesses who have been deposed most frequently who violate them most often.

(b) Ensure that your witness understands your theory of the case and how his testimony fits into it. Prepare him to resist the temptation to offer "off the cuff" opinions on matters you have not asked him to review.

(c) Help the witness anticipate where his opinion will be assaulted and prepare a credible response to good criticisms of his view. Don't deprive your expert of your knowledge about where your adversary's emphasis will be placed.

4. Intra-deposition Issues

(a) Suspending the deposition to seek relief from the court. Fed. R. Civ. P. 30(d) provides that either party or a deponent can suspend the taking of the deposition for the time necessary to petition the court for a protective order when the deposition is being conducted in such a manner so as to annoy, embarrass, or oppress the deponent or party. See Smith v. Loganport Comm. School Corp., 139 F.R.D. 637 (N.D. Ind. 1991).

(b) Objectionable questions.

(1) Fed. R. Civ. P. 32(d)(3)(A)&(B) notes:

(A) "Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been [cured] . . . if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(2) Improper questions include: ambiguous or unintelligible, compound, argumentative, leading (on direct), one that calls for a narrative answer, and one that misquotes the witness' testimony.

(3) Counsel should raise only those objections that will be waived if not made at the deposition. Fed. R. Civ. P. 30, Committee Notes.

(4) Any objections are to be stated "concisely and in a non-argumentative and non-suggestive manner." Fed. R. Civ. P. 30(d)(1). See Danaj v. Farmers (N.D. Okla. 1995)(defense counsel required to cease "speaking objections" and other "obstructionist tactics" at oral deposition).

(5) The objections made will be entered upon the deposition, however, the testimony is taken subject to the objections. Fed. R. Civ. P. 30(c). "A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [to suspend the taking of the deposition because it is being conducted in bad faith, or in a manner to annoy, embarrass, or oppress the deponent or the party]." Fed. R. Civ. P. 30(d)(1). Thus, unless the question seeks privileged information, the witness must answer subject to the objection. See, e.g., Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977); International Union of Elec. Radio and Mach. Workers v. Westinghouse Elec. Corp., 91 F.R.D. 277 (D.D.C. 1981); Coates v Johnson & Johnson, 85 F.R.D. 731 (N.D. Ill. 1980); Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978); Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518 (E.D. Tenn. 1977).

(c) "Private conferences between deponents and their attorneys during the taking of a deposition are generally considered improper." Langer v. Presbyterian Medical Center of Pennsylvania, 1995 WL 79520 at 11 (E.D. Pa. Feb. 17, 1995), vacated on other grounds 1995 WL 395937 (E.D. Pa. July 3, 1995). The only exception is a conference to determine whether a privilege should be asserted. Id. See also Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993).

(d) At the conclusion of opposing counsel's questions, weigh very carefully whether you will question the witness. If you question, you provide your opponent with an additional opportunity for questioning.

5. Logistical considerations. The recording requirements for depositions, Fed. R. Civ. P. 30(b), make it mandatory that counsel defending a deposition consider the logistical arrangements for transcription made by others. Remember:

(a) A deposition notice which does not set forth the method of recording is defective;

(b) Any notary public with a cassette recorder is qualified to record a deposition;

(c) If the method of recording by which counsel intends to take a deposition is likely to capture the testimony inaccurately, it may be necessary to arrange for some other means of recording it.

B. Taking Depositions.

1. Objectives.

(a) To discover admissible evidence and develop information that will lead to evidence.

(b) To obtain admissions and create weaknesses in opponent's case.

(c) To learn what witness knows about the case and to fix his testimony.

(d) To discover strengths and weaknesses of opponent's case.

(e) To develop material for cross-examination.

(f) To evaluate the witness and opposing counsel.

(g) To perpetuate testimony.

(h) To display your capabilities and strengths of your case.

(i) To authenticate and lay the foundation for admission of documents into evidence.

(j) To lay the foundation for motions to compel and dispositive motions.

(k) To improve your posture in settlement negotiations.

2. Preparation.

(a) Same preparation as you would for trial testimony.

(b) Review all previous discovery, organize documents to be used at deposition, and prepare outline of questioning.

(c) A form outline for expert testimony is a good beginning, but must be adapted for the particular facts of your litigation.

3. Logistics.

(a) Retain court reporter. Usually hire reporter in the town where the witness lives rather than taking one with you. Check with U.S. Attorney's office to see who they use regularly.

(i) Make telephonic contact with reporter to confirm date/time of deposition.

(ii) If deposition deals with technical or scientific subjects, ask for reporter with experience in those areas.

(iii) Court reporters often have offices or conference facilities suitable for taking depositions and will make those facilities available for the deposition.

(iv) Check to make sure the reporter will provide the kinds of services necessary (i.e. condensed or electronic transcripts, .pdf files for exhibits?)

(b) Arrange for the place to conduct the deposition if it is not at the witness' or court reporter's office. Motel or airport conference rooms, U.S. Attorney's office, or conference/court room at nearby military installation are suitable.

(c) Send out notice to all parties, and court reporter. Arrange for subpoena if non-party is to be deposed.

(a) Double check with court reporter a day or two ahead of time.

(b) Make the court reporter aware of anything out of the ordinary that is likely to disrupt the proceeding or make the court reporter uncomfortable.

4. Relationship with the deponent.

(a) Make a conscious choice about the style you will display during the deposition. Consider the nature of the witness (e.g. lay or expert; fact or specially retained), the relationship of the witness to the litigation, how the witness is likely to view you, and how your performance may effect the witness' view of you in the trial.

(b) Can change tone and/or style during course of deposition, but if you must "get tough" with the witness, do it after you have gotten all of the concessions you can by being "nice."

(d) Establish early in the deposition that you have command of the facts of the case and that you have prepared for this deposition. This is particularly true for expert witnesses who may be tempted to inflate their credentials or the strength of their opinions unless you convince them that it is dangerous to do so.

5. Relationship with counsel.

(a) Establish control. Arrive early and set the room up as you want it (with deference to the needs and requests of your court reporter).

(b) NEVER let opposing counsel know that your time is limited (e.g. that you need to catch a particular flight home).

(c) Your attitude toward opposing counsel when first entering the room can be very significant to the deponent's perception of you. E.g., if you are courteous and friendly and engage in some "light-hearted" banter, the witness may think that you are not as big an ogre as his lawyer told him you were.

6. Interrogating the witness.

(a) Opening explanation and agreement.

(i) Have court reporter swear witness and, if relevant, attach a copy of notice to record. For video depositions, do the 30(b)(4) litany.

(ii) Introduce yourself on the record and cover following points:

a) Who you represent and purpose of deposition.

b) You will ask questions and witness will answer under oath and court reporter will record the exchange verbatim.

c) Not trying to trick witness, just want to know what information he has that is relevant and material to the case.

d) Ask witness to agree to ask for clarification of any question that he/she does not understand. If question is answered you must assume that witness understood question.

e) If need break just say so.

f) Any reason why can't take the deposition at this time.

g) Any plans to move or change positions in future.

(b) Inquire about the witness' preparation.

1. What documents were reviewed?

2. Who did witness talk to about case?

3. What was substance of any conversation with anyone (including counsel) about case/testimony?

(c) Inquire about documents produced.

1. If documents were to be produced go over each one individually and have deponent identify.

2. If documents were not produced that were requested ask questions to determine who may have custody/control and why they weren't produced.

(d) Miscellaneous.

1. Frequently use catch-all questions:

"Have you told me everything you can remember?"

“Is there anything that would refresh you memory?"

"What else do you recall?"

"Is that all you can remember?"

2. Use pregnant pauses to allow the witness to volunteer information.

3. Clarify special terms:

“When I refer to ‘peer-reviewed journals’ what do understand that to mean, if anything?”

(e) Deal with evasive witnesses.

1. Object to non-responsive answers.

2. Break questions down.

3. Persist.

4. Alert the witness to the proposition that you will not conclude the deposition without responsive answers. (“Shall we break for supper or keep going?”)

(f) Inquire about the witness’ knowledge of other discoverable information.

(g) Respond appropriately to objections.

1. Listen/learn. Re-phrase if you should.

2. Get an answer nonetheless. “You may answer the question."

3. Alert opposing counsel that you know the rules. "Are you instructing the witness not to answer?"

4. Make a complete record. "Are you refusing to answer and, if so, are you doing so on advice of counsel?"

(h) Listen to the answer (you may learn something).

(i) Take notes. Review and ask follow-up questions before concluding your examination.

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